



Comptroller General
of the United States
Washington, D.C. 20548

M. J. N.

147459

Decision

Matter of: Acoustic Systems
File: B-248373; B-248374
Date: August 24, 1992

David Michalek for the protester,
C. Dale Duvall, Department of Veterans Affairs, for the
agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Requirement in invitation for bids (IFB) for the submission with the bid of certified test data from an independent testing laboratory regarding performance and other technical requirements to be met by the contractor in the construction of audiometric examination suites must be viewed as relating to bidder responsibility, as opposed to bid responsiveness, where the IFB did not advise bidders that the requirement would be treated as a matter of bid responsiveness.

DECISION

Acoustic Systems protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 642-11-92, issued by the Veteran Affairs Medical Center (VA), Philadelphia, Pennsylvania, for audiometric examination suites, and the subsequent cancellation of the IFB and the conversion of the procurement into a negotiated one under request for proposals No. 642-17-92.

We sustain the protest.

The IFB was issued on February 12, 1992, to obtain a contractor to provide all labor, materials, equipment, and supervision necessary to furnish and install three double room audio examination suites and one single room radio frequency shielded audio examination suite for VA. Under the section entitled "Description/Specifications/Work Statement," the IFB stated the following:

"Bidders shall submit, along with bids, (a) certified copy of a test report from either the Riverbank Acoustical Laboratories . . . or other independent testing laboratory acceptable to the contracting officer, indicating that the booths to be supplied conform to the provisions of paragraph Numbers 16 through 28, below."

The referenced paragraphs detailed various performance and other technical requirements to be met by the contractor in constructing and installing the suites.

On March 12, VA received three bids, including Acoustic's low bid. Acoustic's bid included a significant amount of test data addressing the certified test data requirement, most of which was generated by its own in-house testing laboratory. VA rejected Acoustic's bid because: (1) much of Acoustic's test data was generated by Acoustic's own in-house laboratory, which VA asserts is not an acceptable independent testing laboratory; (2) Acoustic's test data failed to address paragraph Nos. 22 and 23 covering the installation of duct silencers and system connectors,¹ and (3) the submitted "Standard Radio Frequency Shielding" test data under paragraph No. 28 was for suites different from those bid under the IFB.² After VA determined all bids to be nonresponsive for failing to comply with the certified test data requirement, the IFB was canceled and the procurement converted to a negotiated one.

Acoustic argues that its bid was responsive. Acoustic asserts that its laboratory should have been acceptable because it is independently accredited by the National Institute of Standards and Technology's National Voluntary Laboratory Accreditation Program. Acoustics argues that the test data submitted under paragraph No. 28 was reliable because the tested suites were similar to those being procured and the test data was only to address the shielding, not the booths. Also, paragraph Nos. 22 and 23 apparently only relate to the installation of the suite and it is not clear what an independent laboratory could certify to prior to actual installation.

¹Paragraph No. 22 addresses the requirement for installation of duct silencers while paragraph No. 23 addresses the connections between the air conditioning duct work and booth ventilation silencers.

²Paragraph No. 28 requires standard radio frequency shielding for all suites and that test data for the shielding is required.

The VA reports that, due to the highly technical nature of the suites, the certified test data is vital to enable the procuring activity to evaluate whether the suites proposed by bidders conform to the technical requirements set forth in specification paragraph Nos. 16 through 28. VA argues that Acoustic's test data was insufficient and therefore its bid was properly rejected as nonresponsive.

A requirement for certified test data in a sealed bid procurement can relate either to bid responsiveness or bidder responsibility depending on the intention of the agency as expressed in the solicitation.³ Commercial Window & Door Co., Inc., B-211280, Nov. 18, 1983, 83-2 CPD ¶ 582. Generally, a pre-award testing requirement merely serves to verify the bidder's ability to provide the required items in conformance with the specifications such that the test data usually can be furnished after bid opening, as is the case with any responsibility-related matter. On the other hand, if the data is needed to determine whether the offered items themselves conform to the solicitation's specifications, a bidder's failure to include the data requires rejecting the bid as nonresponsive. Western Waterproofing Co., Inc., B-183155, May 20, 1975, 75-1 CPD ¶ 306.

In determining whether a requirement for literature or data relates to responsiveness as opposed to responsibility, we look to whether the solicitation otherwise complies with the requirements governing the use of descriptive literature needed for determining exactly what the bidder proposes to furnish and whether that meets the specifications. See Federal Acquisition Regulation (FAR) § 14.202-5; Cecile Indus., Inc., B-194273, Apr. 23, 1979, 79-1 CPD ¶ 282; Commercial Window & Door Co., Inc., supra. These requirements include clearly stating in the solicitation the purpose for which the technical data is required, the extent to which it will be considered in the evaluation of the bids, and the rules that will apply if a bidder fails to furnish the literature before bid opening or if the literature fails to comply with the requirements of the solicitation. FAR § 14.202-5(d). In the absence of such language, a provision requiring data should generally relate to bidder responsibility rather than bid responsiveness. See Cecile Indus., Inc., supra; Commercial Window & Door Co., Inc., supra.

³Responsiveness concerns whether a bidder has unequivocally offered to provide the supplies or services in conformity with all material terms and conditions of the IFB; responsibility refers to the bidder's apparent ability and capacity to perform all of the contract requirements. See Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.

Here, the solicitation provision requesting the test data did not include any language regarding the purpose for the data or the consequences for failing to submit the data. Although VA argues that the information is necessary to determine whether the suites conform to the requirements, it included nothing in the solicitation which would have reasonably indicated to bidders that the information was to be provided to enable VA to determine whether the bidder was offering a product that would meet solicitation requirements.⁴ Indeed, some of the required test data appears to relate to the actual installation of the suites (e.g. paragraph Nos. 22 and 23), and we do not understand how certified test data on these matters could be submitted with the bid. Moreover, in light of the precise detail contained in the specifications, it is not clear why testing data would be necessary to determine whether the bidder's system would meet IFB requirements. See Cecile Indus., Inc., supra; Commercial Window & Door Co., Inc., supra; cf. Western Waterproofing Co., Inc., supra (test data was needed to determine precisely what bidders proposed and would be bound to furnish).

Accordingly, we find that the test data in these circumstances involved a matter of responsibility, and that a bid that was noncompliant with the test data requirement properly could not be rejected as nonresponsive. Commercial Window & Door Co., Inc., supra.

We sustain the protest. Since it is not clear whether the agency actually needs the test data to determine the acceptability of offered systems, we are recommending that VA review its needs to determine the actual basis for the test data requirement. If its legitimate needs are for test data that is to be used to determine the acceptability of what bidders offer, VA should issue a new solicitation that clearly so informs bidders/offerors. If, on the other hand, the data is needed only to determine bidder ability to furnish an item meeting the specifications, then VA should reinstate the canceled IFB and determine whether Acoustic is a responsible bidder. (VA, if it chooses to do so, may give Acoustic a reasonable time to submit tests from an acceptable independent laboratory). If VA finds Acoustic to be nonresponsible, since Acoustic is a small business, VA

⁴Because compliance with a data requirement, particularly a testing data requirement, may be burdensome and/or costly, when an agency requires all bidders to furnish the data as an element of bid responsiveness, it must make that clear through the use of the language referenced to above. Otherwise, bidders may assume that the requirement is one that has to be met only by the bidder in line for award, as a matter of that bidder's responsibility.

must then refer the matter to the Small Business Administration (SBA) for a Certificate of Competency (COC).⁵ Under the circumstances, Acoustic is entitled to recover its costs of filing and pursuing the protest, including reasonable attorney's fees. 4 C.F.R. § 21.6(d) (1) (1992).

Milton J. Fowler
for Comptroller General
of the United States

⁵Under the Small Business Act, 15 U.S.C. § 637(b) (7) (A) (1988), no small businesses may be precluded from the award of a contract based solely on a contracting officer's nonresponsibility determination without referral of the matter to the SBA for a COC review. See Mobility System and Equipment Co., B-243332, Apr. 25, 1991, 91-1 CPD ¶ 412.